IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
January 15, 2002 Session

STATE OF TENNESSEE v. BRIAN VAL KELLEY

Direct Appeal from the Criminal Court for Wilson County
No. 99-1455 & 99-1455A John D. Wootten, Jr., Judge

No. M2001-00461-CCA-R3-CD - Filed May 7, 2002

Defendant, Brian Val Kelley, was convicted by a Wilson County jury of one count of premeditated and intentional first degree murder, Tenn. Code Ann. § 39-13-202(1), and one count of murder committed in the perpetration of or attempt to perpetrate aggravated child abuse, Tenn. Code Ann. § 39-13-202(2). The trial court merged the felony-murder conviction with the premeditated and intentional first degree murder conviction and sentenced Defendant to life with the possibility of parole. In this appeal, Defendant raises the following issues: (1) whether Defendant met his burden of proving the defense of insanity by clear and convincing evidence which, without conflicting proof, rendered the evidence against him insufficient to support his convictions; (2) whether the trial court erred by failing to instruct the jury concerning how to properly define "wrongfulness" when considering the defense of insanity; (3) whether the trial court's failure to charge the jury on the lesser-included offense of voluntary manslaughter was reversible error; and (4) whether the trial court erred by improperly limiting the testimony of Defendant's expert witnesses and by giving erroneous instructions to the jury regarding such limitation. After a thorough review of the record and applicable law, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed.

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID H. WELLES and ROBERT W. WEDEMEYER, JJ., joined.

David L. Raybin, Nashville, Tennessee (on appeal) and Gary Vandever, Lebanon, Tennessee (at trial) for the appellant, Brian Val Kelley.

Paul G. Summers, Attorney General and Reporter; David H. Findley, Assistant Attorney General; Tom P. Thompson, Jr., District Attorney General; David Durham, Assistant District Attorney General; and Robert N. Hibbett, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

Shortly after midnight, in the early morning of August 15, 1999, Lori Kelley discovered the body of her thirteen-month-old daughter, Erin Elaine Kelley, dead in her crib. Brian Kelley, the father of the child and Defendant in this case, admitted to both his wife and the police that he smothered the infant. Later the same day, an arrest warrant was issued charging Defendant with criminal homicide, and he was transported to the Wilson County jail.

On August 16, 1999, the Wilson County General Sessions Court issued an order directing that Defendant undergo a forensic evaluation by the Cumberland Mental Health Center, pursuant to Tennessee Code Annotated section 33-7-301, for the purpose of determining his competency to stand trial and his mental condition at the time of the crime. Based on a conclusion that the required determination could not be made on an "outpatient basis," Dr. Sandra Phillips recommended that Defendant be referred to the Forensic Services Division of the Middle Tennessee Mental Health Institute ("MTMHI") for an inpatient evaluation. Defendant was admitted to MTMHI on August 25, 1999. On September 11, while undergoing mental evaluation, Defendant was indicted on one count each of premeditated and intentional first degree murder and first degree murder committed during the perpetration of a felony.

On September 20, 1999, the doctors at MTMHI determined that Defendant's condition was such that he was "capable of adequately assisting in his defense in a court of law." With regard to Defendant's mental condition at the time of the alleged offense, the doctors also concluded that the defense of insanity could be supported, pursuant to the provisions of Tennessee Code Annotated section 39-11-501. Defendant was discharged from inpatient status and returned to the custody of the Wilson County Jail.

Shortly thereafter, Defendant's counsel filed a petition requesting that Defendant be judicially hospitalized under Tennessee Code Annotated sections 33-7-301(b) and 33-6-104. Following a hearing on September 22, 1999, the Wilson County Criminal Court found that Defendant's mental condition had deteriorated to the extent that he might be incompetent to stand trial. In addition, the court determined that Defendant was mentally ill and that the illness posed the likelihood of serious harm, requiring commitment to a mental hospital or treatment resource because all available less drastic alternatives were unsuitable. Defendant was returned to MTMHI, where he was placed in the custody of the Commissioner of Mental Health and Mental Retardation for treatment and evaluation. The court further ordered that MTMHI report on Defendant's progress and condition as it related to standing trial every six months.

On November 29, 1999, the Wilson County Criminal Court granted the State's request to allow an independent qualified expert to conduct a forensic evaluation of Defendant's mental condition, pursuant to Tennessee Code Annotated section 33-7-301(a)(2)(B). The issues to be

addressed were Defendant's competency to stand trial and mental condition at the time of the crime. The State selected Dr. Daniel Martell, who conducted an independent evaluation as requested.

On February 24, 2000, the clinical staff at MTMHI opined that Defendant remained incompetent to stand trial and that he was also unable to assist his attorney in matters related to his defense. On March 23, 2000, the MTMHI staff determined that although Defendant was still committable, his condition had improved such that he was competent to stand trial. Defendant filed a notice of intent to present an insanity defense. The trial commenced on September 5, 2000, and lasted three days.

EVIDENCE AT TRIAL

I. Lay Testimony

At Defendant's trial, Dorothy Jean Reynolds, the director of the Wilson County 911 Communications System, identified the tape recording of a telephone conversation that occurred between Defendant and the 911 emergency dispatcher on the evening the victim was killed. The tape recording began with the 911 dispatcher calling Defendant's residence, because a previous telephone call from Defendant's location had been disconnected before the dispatcher could speak with anyone. At trial, the tape was played for the jury and revealed the following colloquy:

911 DISPATCHER: [Dialing sound. Phone ringing.]

DEFENDANT: Hello.

911 DISPATCHER: Yes. This is Wilson County 911. I just received a hang up call from there. Is everything okay?

DEFENDANT: Yes. It's just fine.

911 DISPATCHER: Who is that screaming in the background?

DEFENDANT: Oh . . . that's my wife.

911 DISPATCHER: Are you sure everything's okay over there sir?

DEFENDANT: Yeah, its fine.

911 DISPATCHER: Can I talk to her?

DEFENDANT: Sure. [A pause.] Uh . . . she's kinda . . . she took off.

911 DISPATCHER: All right, sir. Are you sure everything's okay?

DEFENDANT: Well . . . she found . . . um . . . uh . . . found my daughter. She's . . . uh . . . she's in the crib, dead.

911 DISPATCHER: All right. Tell ya what . . . you stay a while, okay?

DEFENDANT: Okay.

911 DISPATCHER: Are you still at 512 Stonehenge Drive?

DEFENDANT: Yeah.

911 DISPATCHER: Uh . . . Kelley, last name?

DEFENDANT: Yes, sir.

911 DISPATCHER: All right. Tell ya what . . . I am going to--I am going to hang up with you, and I am going to get an ambulance over there.

DEFENDANT: Okay.

911 DISPATCHER: And I am going to call you right back, okay?

DEFENDANT: Okay.

911 DISPATCHER: So, the baby was dead in the crib.

DEFENDANT: Yes.

911 DISPATCHER: Okay. All right. Bye.

DEFENDANT: Bye.

Officer Mike Wentzell, with the Lebanon Police Department, testified that he was on duty at 12:52 a.m. August 15, 1999, when the police received a request for assistance at 512 Stonehenge Drive, in Lebanon, Tennessee. When Wentzell arrived, Lori Kelley, Defendant's wife, was waiting in the front yard and ran out to meet his police car. Wentzell testified that Ms. Kelley was crying and screaming and wanted to know whether he could perform CPR. Wentzell answered affirmatively. Ms. Kelley informed Wentzell that her baby was not breathing, and then led him into the Kelley's house via the back door. Ms. Kelley also informed Wentzell that she believed her husband had killed their baby by smothering it.

Officer Wentzell testified that he called out Defendant's name upon entering the Kelley's house. Wentzell could hear Defendant's voice and subsequently found him standing in the doorway

to the bedroom. He was naked and unarmed. Wentzell asked Defendant what was going on. Defendant replied that he had "smothered the baby." Wentzell asked why. Defendant responded that God had directed him to sacrifice his daughter because she was perfect and innocent. Defendant also told him that Jesus was coming soon. Wentzell instructed Defendant to put some clothes on and show him the infant. Defendant took Wentzell to a room at the back of the house which strongly smelled of vomit. Wentzell testified that the child in the crib was obviously dead--her skin was extremely white and her lips were blue.

Defendant was arrested and placed in Wentzell's patrol car, at which point Defendant had a conversation with some officers which was recorded by a video camera in the vehicle. The video tape was played for the jury and revealed, in relevant part, the following conversation between Defendant and various officers:

OFFICER 1: Okay. Now, what did you tell me?

DEFENDANT: God told me to do it.

OFFICER 1: God told you to do what?

DEFENDANT: To sacrifice.

OFFICER 1: Okay. And, how did he tell you to sacrifice?

DEFENDANT: Through the spirit.

OFFICER 1: No, I mean, what did he tell you to do, as far as --

DEFENDANT: Just smother her.

OFFICER 1: God told you to smother her?

DEFENDANT: Yeah.

OFFICER 1: Your baby?

DEFENDANT: Yes, sir.

OFFICER 1: When did he tell you to do this?

DEFENDANT: Ah, he didn't let me know until tonight . . . .

* * *

OFFICER 2: [W]hat did you suffocate her with?

DEFENDANT: Ah, just my hand.

OFFICER 2: Just your hand? Okay. Well, before I go further with my questioning . . . You're under arrest. [An officer read Defendant the Miranda warnings.]

* * *

OFFICER 2: I'm just trying to understand, because this isn't something that happens all the time, you know, as far as--

DEFENDANT: I understand. He's coming back soon; okay? And, he was dealing with me with the spirit, leading me along the way, letting me walk to see things through with his eyes. And, then he kind of surprised he with this tonight, for me to--for him to come back, I was going to have to do this.

OFFICER 2: That you were going to have to sacrifice your child?

DEFENDANT: Yes, sir.

OFFICER 2: Did he say why it would have to be your child?

DEFENDANT: Well, she's a symbol. She's a perfect little angel-type child.

A transcript of the entire tape recording was entered into evidence also. In the presence of the jury, the trial judge stated that the actual audio/video tape was the "best evidence" and, therefore, the transcription should be used as merely an aid in recalling what was said on the tape.

Wentzell transported Defendant from the crime scene to the Lebanon Police Department and, some time later, he also transported him to the Wilson County Jail. Wentzell testified that during the ride to the jail, Defendant told Wentzell that he appreciated Wentzell's kindness toward him and that he knew what he did was "wrong." Wentzell said that he noticed a slight change in Defendant's personality at this point, but he did not elaborate further on this observation during his testimony.

Detective Scott Osborn interviewed Defendant when he arrived at the Lebanon Police Department with Officer Wentzell. Osborn testified that one of the first things Defendant said was, "What do you want to know? I killed my daughter, the father told me to do it." Defendant also discussed various events of his life, including a religious experience at a golf course and Jesus' presence in a woodcarving booth at the fair. In Osborn's opinion, Defendant had no problem understanding what was said to him, although Osborn had some difficulty keeping Defendant

"focused." Defendant appeared "very calm." At certain points during the interview, he placed his hands behind his head, rocked back, and put his feet up onto the table.

After the interview, Osborn left the room to give Defendant time to compose the following written statement, which was read into evidence at trial: "I, Brian Kelley, killed my daughter, Erin Elaine Kelley, so that Christ could return." Defendant signed the statement and dated it: "8/15/99, 3:27 a.m." Afterward, Osborn asked Defendant a series of questions, during which he handwrote his questions and Defendant's answers. The transcription of this question and answer session was read into evidence at trial:

QUESTION: Would you explain what happened tonight, with your daughter?
ANSWER: My wife and I were in bed, the Holy Spirit whispered in my ear.
QUESTION: What was the Holy Spirit saying?
ANSWER: I felt like he was telling me to take my daughter's life.
QUESTION: Did he tell you how to go about it?
ANSWER: I felt like suffocation would make it easiest on my daughter.
QUESTION: So, did you make a decision to suffocate your daughter?
ANSWER: Yes. I didn't think I had a choice, but I guess I did.
QUESTION: Earlier you said that you took your daughter out of the crib and sat down on the rocking chair with a small bear, but it wasn't doing the job; would you explain what happened next?
ANSWER: I used my right hand to cover her mouth and smother her nose, kind of like when you baptize someone.
QUESTION: Do you remember how long you did this?
ANSWER: I don't remember. It seemed like an eternity. It was horrible.
QUESTION: Earlier you stated that you were naked and sitting in the chair and that blood and water came out of your daughter's nose; is that correct?
ANSWER: Yes, sir. Some of it ran down my belly so I put her back in the crib and took a shower.

Defendant also signed the above transcription and dated it: "8/15/99, 4:28 a.m."

Some time later, Detective James Burton interviewed Defendant a second time. Osborn remained present during the second interrogation and reported that Defendant's answers were essentially a "rehash" of his first statements. Near the conclusion of Burton's interview, Osborn asked Defendant whether, "based on the laws and rules that people have here on earth that we go by, [did Defendant] feel like what [he] did was wrong?" Defendant responded that he knew that what he did was "wrong" and that "he could be punished for it." Defendant also stated that "the laws here only exist because God allows them." The second interview concluded at 4:28 a.m. on August 15, 1999.

During cross-examination, Osborn testified that he had a hard time keeping Defendant "on track" during the first interview. Defendant had revealed to Osborn that he was having problems at

work and difficulty sleeping. Defendant believed that the problems he was having were one of God's "tests" for him because God had something for him to do. On redirect, Osborn testified that Defendant admitted trying to suffocate his daughter twice. His first attempt, with a teddy bear, was unsuccessful.

James David Burton II, the lead detective in the investigation of the killing of Defendant's daughter, testified that he conducted a second interview of Defendant following Osborn's initial interrogation. Defendant's posture was casual and relaxed when Burton found him; he had his feet propped on Osborn's desk.

Burton introduced himself to Defendant, and then explained that he wanted to review what Defendant had previously discussed with Osborn. Among other things, Defendant proceeded to tell Burton the following: On the evening of August 14, 1999, he and his wife and child had gone to the County Fair. On their return home, they put the baby, Erin, to bed and then went to bed themselves. Later, at approximately midnight, Defendant felt that "he just had to do something else." He felt that he was being "prompted" and got out of bed to pray over Erin. Defendant entered Erin's room, took her from her bed, and sat down with her in a rocking chair. At that point, he began to receive visions of the biblical characters Abraham and Isaac. He also received instructions to sacrifice his daughter because she was "perfect." He believed that this had to be done before Christ could return. He decided that suffocation would be the most humane way to do what he had to do, and he hoped that his wife would not get up during his sacrifice because it would be "hard on her."

Defendant told Burton that first he picked up a teddy bear and placed it over Erin's face, but this "wasn't quite doing the job." So, Defendant discarded the teddy bear and placed his hand over Erin's nose and mouth. He held it there until Erin died, and then put her back in bed. At this point, Defendant felt he needed to relax and took a shower for this purpose. While he was in the shower, his wife woke up and came into the bathroom because she wondered what he was doing. Next, she checked on Erin and discovered that she was dead.

When Burton asked Defendant what he would have done if his wife had slept through the night and not discovered the dead baby, he replied that he had not thought that far ahead. He probably would have slept in the study and, by the time his wife woke up in the morning, everything would be all right for "the Father, the bride and the daughter would all be together again." Near the conclusion of the interview, Burton also asked Defendant whether, "according to the laws of this country and . . . land, [did] he think that what he did was wrong." Defendant replied: "Oh, yes, sir. What I did according to the laws of this country, yes, sir, it was wrong. But I don't go by the laws of this land, I go by the laws of God." Burton said that Defendant appeared alert and able to comprehend what was going on during the interview.

On cross-examination, Burton related certain details of his interview with Defendant's wife, Lori Kelley. For example, she informed him that Defendant's "religious experiences" had started "a few weeks back." Ms. Kelley told Burton that Defendant had informed her that he was going to be on the Larry King show in a year. Defendant also told his wife that he believed the Holy Spirit

had come over him and was revealing information through him. When she became concerned, Defendant told her that everything would be "okay" and Jesus was returning soon. Burton's investigation also revealed that the Kelley's did not have life insurance on Erin and that there was no history of child abuse or marital problems in the Kelley household.

Dr. Charles Warren Harlan, a forensic pathologist, performed an autopsy on the victim. Dr. Harlan testified that the cause of death was a specific type of suffocation referred to as "burking." Specifically, he stated that "burking" is used to describe death caused by impeding the airway of an individual. This may be accomplished by pinching the nose, covering the mouth, and forcing the chin upward so that air passage to the lungs is impossible. The neck of the victim also revealed mild purple congestion in the area of the throat, which indicated that there was a problem with breathing or circulation in and about the head. According to Dr. Harlan, death would normally occur in approximately thirty seconds in a thirteen-month-old child, such as the victim in this case. However, in certain circumstances, it could have taken as long as four to five minutes.

The State rested its case at the conclusion of the above evidence. The next witness to testify was Lori Ann Kelley, Defendant's wife. Ms. Kelley and Defendant had been married approximately five years at the time of trial. She testified that Defendant was a loving father. He took care of Erin every Wednesday, his day off, and seemed very proud of her. Defendant was a deacon at the Mount Olivet Baptist Church and attended services regularly. He was also employed as a recycling coordinator at the Wilson County Landfill, but he had recently begun looking for another job because he felt he was being pressured to resign his position at work. In July 1999, Defendant's employer had decreased his salary and took away the company vehicle Defendant was using. This "upset" Defendant and affected him physically. For example, Defendant began to experience frequent stomach aches and headaches afterward. He also lost approximately twenty to thirty pounds and had trouble sleeping. Ms. Kelley testified that from August 5, 1999, through August 8, Defendant did not sleep at all.

Ms. Kelley testified that Defendant was a Christian man who prayed and read the Bible but, prior to August 9, 1999, she would not have classified his religious attitude as a "preoccupation" or an "obsession." This began to change the week beginning August 9. Defendant attributed religious significance to "almost anything that happened." As an illustration, Defendant told Ms. Kelley that he believed the television evangelist, John Hagee, was "the modern day John the Baptist." Defendant based this conclusion on the fact that they both came from the wilderness (Texas, in Hagee's case) and had the same name.

Ms. Kelley testified that on Monday, August 9, 1999, Defendant did not go to work as usual. Instead, he had arranged to meet a potential business partner and discuss starting his own company. When Ms. Kelley arrived home from work that evening, Defendant appeared "very subdued." He reported that the meeting was unsuccessful, a "no go," but that other possibilities existed. Defendant also confessed to her that he had a religious experience before the meeting, during which he fell to his knees in the family room and the Holy Spirit came over him. Ms. Kelley attributed Defendant's

odd behavior, at least in part, to the fact that he had not slept in four days. Defendant went to bed that evening at approximately 7:00 p.m. and finally slept.

Ms. Kelley testified that it was "very unusual" for Defendant to miss work, but Tuesday, August 10, Defendant again did not go to work. Instead, he played golf with his mother. When Ms. Kelley arrived home after work that evening, Defendant told her that his day had been beautiful and peaceful. He told her that he had written down three sevens, "777," as his score for hole number five. He interpreted this to mean that, in one year, he would be invited to discuss his new business on the Larry King Show with five other persons, including Billy Graham and John Hagee. His new business would be called, "Calvary Waste." Defendant was "grinning from ear to ear" and appeared very happy that night.

On Thursday, August 12, Ms. Kelley began to feel that something was "not quite on the up and up" with Defendant. That evening, she and Defendant were supposed to have dinner with Defendant's parents. Defendant arrived at his parents' home early, sometime before 4:30 p.m. He then left to go home and shower, but was expected back shortly. (The Kelley's home was only a mile or two away.) When Ms. Kelley showed up at approximately 6:00 or 6:30 p.m., Defendant had still not returned and he was not at their house. They canvassed the neighborhood without success and notified the Sheriff's Office that he was missing. At approximately 9:30 p.m., Defendant returned. He had driven to the Hickory Hollow Mall in Nashville to pick up a picture he had left to be framed. When Ms. Kelley asked him why he would break their dinner plans to do that, he replied, "I didn't know I was going anywhere until I was gone. And I didn't know where I was going until I got there." That evening, Defendant also informed her that Jesus was returning on Sunday and that the two of them would be responsible for taking over John Hagee's church when he was gone. A few hours later, she asked him to tell her more about Jesus' return, and Defendant denied making the statement.

Ms. Kelley testified that she and Defendant had planned to go to the County Fair after dinner on Saturday, August 14. After she finished cooking, Ms. Kelley informed Defendant three or four times that dinner was ready and he just looked at her. When he finally responded, it was to state that he needed to go to the bathroom first. She assumed that was what he did because she heard the toilet flush, but he did not return. Ms. Kelley found him staring into the bedroom mirror. She told him two more times that his dinner was ready. He just looked at her and asked her what she was doing there. When she reminded him that he was on his way to the bathroom, he responded, "Oh, yeah, that's right," and went back into the bathroom. Later, Defendant came back and ate dinner. They took Erin to the fair afterward and returned home at approximately 8:00 p.m. At 10:00 p.m., Defendant told Ms. Kelley that he needed to telephone his friend, Donnie Price, in Cincinnati. She warned him that it was 11:00 p.m. in Ohio, so he tried to log on to his computer because he believed he had an e-mail from Donnie there. Unable to pull up his e-mail, Defendant called Donnie. He told Ms. Kelley that he needed to thank Donnie for the e-mail (which he had not read yet). When Donnie did not answer his telephone, Defendant left a message on the answering machine and went to bed.

Ms. Kelley woke up shortly after 12:00 a.m. and discovered that Defendant was not in bed. This was not extraordinary since he had not been sleeping well. However, this time she did not hear the television or see any lights on, as often occurred when he was plagued by insomnia. She got out of bed to look for him and discovered him taking a shower. She opened the bathroom door and asked Defendant what he was doing. He replied that he was taking a shower to relax because he could not sleep. Thereafter, Ms. Kelley walked into Erin's room and immediately noticed that Erin had vomited and was covered by a blanket. Ms. Kelley removed the blanket and noted that Erin was "very, very still." She appeared to have stopped breathing and was also blue in color. At this point, Ms. Kelley began to scream. Defendant ran into the room and grabbed her by the shoulders to calm her down, but Ms. Kelley only shouted, "What did you do; what did you do?" Defendant replied that "nothing had happened." Then he told her that he "did it," but "it's all going to be okay." Ms. Kelley dialed 911, but Defendant removed the telephone from her hand and hung it up. Almost immediately, the telephone rang back and Defendant answered. Ms. Kelley ran out of the house and to the neighbor's home to get help. Her neighbor called 911 and was informed that the situation had already been reported. Ms. Kelley testified that she was hysterical at that point. The police arrived a short time later, and she returned to her house with an officer. At that time, Defendant was in the bedroom getting dressed. She heard him say, "God told me to."

Ms. Kelley testified that, in retrospect, Defendant had appeared very calm and peaceful the entire week of August 9 (which culminated in the killing on Saturday night). He also appeared to be "preoccupied." For example, that particular week she often had to ask him a question several times before he would answer her. When Ms. Kelley asked Defendant whether he was "okay," she received the same response every time, namely, that everything, including Defendant, was "just fine." In the beginning, Ms. Kelley did not suspect that anything was truly wrong with Defendant. She attributed his strange behavior to stress from pressure at work and lack of sleep. Moreover, her husband was a Christian man, who believed that one should look to the Lord for guidance in times of trouble. Thus, Defendant's religious attitude did not seem exceptionally unusual to her.

Raymond Val Kelley, Defendant's father, testified that Defendant was a "good child." As parents, they had no incidents of violence or other problems to contend with during his childhood. Mr. Kelley confirmed that Defendant was discontented with his job. His problems at work began shortly after the solid waste board rescinded a promotion and raise recently given Defendant by his boss. At the same time, the board also terminated his use of a company truck that Defendant had driven for five years. Defendant started looking for other employment opportunities. Mr. Kelley said that he realized Defendant was under stress at that point, but he did not know how much.

With regard to instances of unusual conduct by Defendant in August 1999, Mr. Kelley testified that Defendant called him at approximately 10:00 p.m. one evening to inform him that John Hagee was actually John the Baptist. Defendant claimed that he received this information in a revelation. Defendant had also shown an odd interest in a tornado that hit Salt Lake City and an eclipse that reportedly stopped over Jerusalem. On August 12, 1999, Defendant and his family were scheduled to come for dinner. Defendant showed up early, sat down in a chair and began to sing, "Jesus, Jesus, the battle is over." Mr. Kelley thought it was peculiar that Defendant sounded off key,

as he was one of few members of the family who could sing. A thunderstorm began at that point, and Defendant asked what Jesus had said to calm the water. Mr. Kelley could not recall precisely. A few minutes later, Defendant was gone. He had told his mother he wanted to take a shower at home. She asked him to return at 6:00 or 6:30 p.m. for dinner, but he did not. They drove around looking for him without success. Mr. Kelley testified that it was unusual for Defendant not to keep people apprised of his whereabouts. Because Defendant's family had a history of mental illness, and Mr. Kelley feared that Defendant might be suicidal, the family notified Sheriff Ashe that he was missing. Defendant returned to their house at approximately 8:30 p.m. that evening. He had gone to the Hickory Hollow Mall to pick up a picture of a temple that he was having framed. Defendant ate dinner and went home.

Defendant's behavior concerned Mr. Kelley. On Saturday, August 14, he drove to Defendant's workplace to visit him. Defendant appeared "flat." Mr. Kelley had lunch with Defendant and their conversation turned to religious subjects. Mr. Kelley asked Defendant when he thought Jesus was returning. Defendant replied that Jesus would be back before Defendant's next birthday, which was the following Monday, and asked Mr. Kelley to keep that information confidential. At that point, Mr. Kelley knew they would need to get Defendant some "help."

During cross-examination, Mr. Kelley testified that Defendant's health history contained no head or brain injuries, and, prior to August 15, 1999, he had not received any mental health care. Mr. Kelley was not aware of anything which might require that Defendant undergo mental treatment, with the exception of one period of depression Defendant suffered while in college, which resulted in his dropping out of school.

Betty Kelley, Defendant's mother, testified that Defendant was a good father who loved his daughter. Defendant shared in the responsibility of raising Erin and spent every Wednesday, his day off, caring for her. Betty testified that, prior to the summer of 1999, Defendant was a compassionate and "laid back young man." During the Summer of 1999, he began to appear "troubled" and "emotionally strung out." Betty testified that on Tuesday, August 10, 1999, she played golf with Defendant in the hope it would help him relax. After their game, Defendant exclaimed that it was the best round of golf he ever played. Betty knew that it was not. On the way home, Defendant told her that he had an "incredible" experience with the Lord on the previous Monday, which caused him to fall on the floor, face down, where he "just cried and prayed." Defendant told her that the Lord had been testing him. Betty discussed seeking professional help for Defendant with Defendant's father and with Lori, Defendant's wife. Defendant's father had required professional help when he suffered problems with anxiety. Defendant's grandmother was diagnosed with schizophrenia at one point, and, another time, she was diagnosed as "bipolar."

Eric Breedlove testified that he managed a store called "Michael's" in the Hickory Hollow Mall in August 1999. Breedlove testified that Defendant came into his store in early or mid-August to pick up a frame order that he had just placed a couple of days earlier. Due to a thunderstorm, the store did not have electrical power. Defendant asked about the frame, and Breedlove informed him that his order would not be ready for two weeks. Nevertheless, Defendant told Breedlove that he

would wait outside for the power to come back on. Defendant waited for three hours, during which he and Breedlove discussed religious matters. Breedlove did not recall the specific subjects they talked about.

Bill Arnold, Defendant's supervisor at the Wilson County Landfill, testified that Defendant was a good employee. Then, in July 1999, an issue arose regarding whether his raise was proper. The incident received substantial media attention. Defendant's raise was subsequently revoked and his company truck was taken away. This upset Defendant. Although Arnold never asked for his resignation, Defendant confided in him his belief that his future with the company was nil.

Arnold testified that at the beginning of the week prior to August 15, 1999, Defendant informed him that he had not been sleeping well. He asked permission to take off Monday and Tuesday. Arnold granted his request. Wednesday was Defendant's regular day off; he worked a half-day on Thursday; and he returned to his regular shifts on Friday and Saturday. The upcoming Sunday, August 16, Arnold was scheduled to work the evening shift and Defendant, the morning shift. Defendant wanted to attend church, so the men switched shifts. The last conversation he had with Defendant occurred on Saturday when he confirmed the switch. Defendant said, "I'll see you tomorrow." In Arnold's opinion, Defendant had appeared "normal" the entire week.

Donnie Price, a friend of Defendant's from childhood, testified that he and Defendant ordinarily saw each other several times a year. Price testified that he had a telephone conversation with Defendant on August 10, 1999, which was atypical for a couple of reasons. First, it was of a predominantly spiritual nature. Price testified that it was not uncommon for he and Defendant to have spiritual discussions, but God had never been the main focus of their conversation. Second, Defendant informed Price that they could not get together during Price's upcoming visit. Instead, Defendant had made plans with other people because he was worried about their salvation. Price was surprised because he and Defendant normally spent time together when Price was in town.

Price testified that on August 8, he received an e-mail from Defendant which was "odd" in that Defendant again grounded his message in spiritual themes and wrote the word "God" in capitals throughout the message. On August 14, Defendant left Price a phone message thanking him for his prayers. Defendant also informed Price that he would start calling him "Paul."

Christopher Jason Repsher worked for an architectural engineering firm in Nashville and supervised a landfill operation group. Repsher testified that he met Defendant approximately three and one-half years before the trial, when the firm began working on Wilson County landfills. Defendant had appeared very articulate, knowledgable, and willing to learn. Thus, when Defendant expressed an interest in leaving the employ of the County, Repsher arranged a couple of meetings in early August 1999 to introduce him to some potential business partners. Repsher testified that he and Defendant prepared a good presentation, but their meeting with the potential partner went poorly because Defendant became extremely nervous. He was also unable to properly finish sentences or express his thoughts. At one point in the meeting, Defendant interrupted the business discussion to interrogate their guest about his religious background. A few days later, Repsher met with

Defendant again to discuss starting his own company. This time, Defendant engaged Repsher in a religious discussion, and, during the course of a conversation about finances, he got up from the table and wandered into another room.

Terry Ashe, the Sheriff of Wilson County, testified that he had known Defendant all of his life and, when he spoke with Defendant at the jail on Sunday morning, August 15, 1999, "[Defendant] was calm but not very rational." Jason Gray, a Wilson County Deputy Sheriff, testified that he also observed Defendant during his incarceration at the jail. Officer Gray reported that, on August 16, the day after his arrest, Defendant appeared to be "real quiet and calm" and "kind of at peace, like, he didn't have any worries." After a few days, Defendant left the jail to undergo a mental evaluation. On cross-examination, Officer Gray testified that Defendant did not behave "peculiarly" until he returned to the jail. At that point, Gray believed that he did "real obvious things to draw attention . . . things you can't help but notice." When asked, Officer Gray agreed that "[Defendant] would do most of these things if he or someone was watching him." He also admitted that, because Defendant was on "suicide watch," someone watched him twenty-four hours a day.

Virginia McAfee, testified that she was the wife of the minister at Mount Olivet Baptist Church, which Defendant attended and where he served as a deacon. Ms. McAfee had known Defendant personally and through the church for nine years. She testified that during this time, she had numerous opportunities to observe Defendant with his daughter, Erin, and she considered their relationship "very good." In her mind, there was no doubt that Defendant loved Erin. Regarding her visit with Defendant in the Wilson County Jail after his arrest and prior to his transfer to the mental institute, Ms. McAfee commented: "He was not [Defendant]. He was very disoriented. I really don't know how to explain it exactly. He just kind of stared in a blank stare. He didn't quite understand things that were being said. He was just very, very unusual." During cross-examination, she characterized Defendant as loving, God-fearing, and a person who knew right from wrong.

Harold Taylor, Ricky Coffee, and Michelle Vance, testified that they had worked with Defendant. Taylor and Vance claimed that Defendant's behavior changed in the weeks prior to August 15, 1999. Taylor testified that when he arrived at work on the morning of Thursday, August 12, Defendant asked him and two other employees, "Are you ready to go?" Taylor asked what Defendant was referring to, and Defendant replied, "The Lord is coming back" and, "I'm going to get a new kneecap." According to Taylor, he was a different man then, and "just not there" anymore. Michelle Vance similarly testified that Defendant had become "strange" in August. She noted that he had become introverted and less interested in his job. He also appeared at work unshaven, which he had never done before. Conversely, Ricky Coffee testified that he witnessed no bizarre behavior on the part of Defendant in August. Coffee admitted that he was present when Defendant declared that the Lord was returning and a new kneecap was on the way, but he found this not unusual.

Rebecca Jane Smith, a psychiatric social worker with the MTMHI forensic services program, testified that her job entailed working with an evaluation team to determine whether a defendant is competent to stand trial. While defendants are hospitalized, Smith assisted them in communicating with their attorneys, the community, and the mental health center when they are ready for discharge.

In addition, Smith was responsible for compiling a social history on the defendant to assist the psychologists and psychiatrists in determining commitability issues and other matters relevant to an insanity defense. Smith testified that the social history on Defendant was prepared from information received from persons other than Defendant, i.e., his parents, wife, employer, and coworkers.

Smith testified that she met Defendant when he was transferred from the unsecured area of MTMHI facility to the maximum security division of forensic services on August 25, 1999. Standard admission procedure requires assessment and admission, followed by a formal interview by the treatment team. In Defendant's case, the treatment team members were Dr. Samuel Craddock, a clinical psychologist, and Dr. Rokeya Farrooque, a psychiatrist, in addition to herself and a nurse. At the initial interview, Defendant was able to give the team significant information pertaining to his background and the circumstances surrounding the crime charged. He also appeared calm and coherent. Smith met with Defendant at least once a week (a total of approximately fifty or sixty times) during the year preceding the trial.

Regarding the commission of the instant offense on August 15, 1999, Smith testified that her conversation with Defendant revealed the following: Defendant and his family had gone to the County Fair and a friend's house. Sometime after they arrived at home, Defendant was "dealing with the Holy Spirit," but stated that the voice was not audible. He also attempted to contact various friends. He felt "led" to call a former girlfriend, but could not find her phone number in the telephone book. Next, he felt compelled to pray for his daughter. As he watched her sleep, the thought came to him that he would have to sacrifice her so that Christ could return. Defendant said that at first he argued with God on this matter, claiming that there was no way he could go through with it. Thereafter, he picked her up, sat down in a rocking chair, and began smothering her. Defendant described it as "horrible," and he prayed at that time that his wife would not come into the room. After his child died, he took a shower. When his wife came into the bathroom, he told her to go back to bed. Defendant told Smith, "Once you know what you're supposed to do, you have to be obedient and do it."

During another session, Defendant informed Smith that he was having second thoughts about not needing further treatment. Defendant said he felt "confined." He had started chanting, his hands were shaking, his heart was racing, and he felt "nervous." Defendant then regressed in time to the Sunday prior to the offense: he said that he was watching television when, suddenly, the screen went blank and the message, "Praise Jesus, Praise Jesus, Praise Jesus" began to scroll across it. When they discussed his lack of guilt for the crime, Defendant hypothesized that this was possible because he knew "he didn't have control." He cited a time when he panicked because he had become separated from his wife and daughter for a brief period at the County Fair. He was perplexed by the fact that he could feel that protective about his family and yet, take his daughter's life a few hours later. Defendant admitted that his mind was not right and that he missed his daughter. It had occurred to him that he made an error in judgment. He believed that possibly *he* was the one that should have been sacrificed. If he had killed himself instead of his daughter, things might have occurred as they were intended, such as Christ's return.

Smith also testified that she had observed no evidence of malingering on the part of Defendant during the Institute's examination of him. In her opinion, his symptoms were consistent, and his condition has improved since he was admitted to MTMHI. At that time, Defendant was taking the following medications: Prozac, 20 mgs; Depakote, 500 mgs; Zyprexa, 10 mgs; and Vistaril, 50 mgs.

II. Expert Testimony

The first expert witness presented was Dr. Sandy Phillips, a clinical psychologist and the director at Cumberland Mental Health Services. Dr. Phillips testified that her duties include conducting forensic evaluations of a defendant's competency to stand trial and mental condition at the time of the crime. To that end, Dr. Phillips saw Defendant on three occasions during a two-day period beginning Monday, August 16, 1999, at the Wilson County Jail. She testified that Defendant's demeanor was uncommon, in that he appeared very confident and energetic. He smiled at Dr. Phillips when they met and related to her various details concerning his situation without difficulty , e.g., how long he had been in jail, who had visited, what he was charged with, et cetera. In a very matter-of-fact way ("as if he was describing the weather"), Defendant informed Dr. Phillips that he was charged with murder because he had been instructed to sacrifice his daughter so that Christ could return. He described the events leading to the act and told her that, although this had been a particularly difficult time for him, life was once again "perfect" in his mind. Defendant discussed his father, expressed puzzlement over why bad things happen to good people, and described various religious "visions" he had recently experienced.

Dr. Phillips testified that Defendant's speech began to resemble something that psychologists refer to as "circumstantial speech," meaning that his conversation stayed on the same topic, but did not display a good connection between thoughts. His discourse also showed signs of a developing delusional system, which occurs when subjects put together thoughts in a way that is very idiosyncratic to that person. This is considered a sign of psychosis, and anyone not suffering from a mental illness can instantly recognize that the subject's logic is incorrect or the premises untrue. Although Defendant believed that everything he was telling Dr. Phillips was true, he also seemed to sense a strangeness about it and explained that one should not question God. With regard to killing Erin, Defendant said that he felt "a leading to sacrifice her." He had argued with God about the sacrifice, just as Jesus had done, asking him if there was another way. Having received no alternative instructions, he smothered his child so that Christ could return. He told her that it was the hardest thing he had ever done but summed up his feelings in this way: "I'm at peace with it. I've been obedient and I'll see her soon." With absolute certainty, Defendant stated that Christ would return by sundown that evening. He was aware that people thought he was crazy. As Dr. Phillips departed, she and Defendant acknowledged that they would certainly see each other again the next day–in heaven if his assertions were correct, in jail if they were not.

When Dr. Phillips returned the next day, Defendant was beginning to question what he had done. He wondered if he had been under the influence of Satan, rather than God, because he suspected that God probably would not ask a person to destroy his child. He confessed that he had

considered grabbing a gun from a police officer and shooting himself. Worried for his safety, Dr. Phillips had him committed to the MTMHI. Her initial diagnosis was acute psychotic episode, with religious delusions. Upon receiving additional information, Dr. Phillips changed her diagnosis to bipolar I disorder, with psychotic features, which she classified as a "severe mental disease." (On cross-examination, Dr. Phillips explained that the primary difference between the two diagnoses is the duration of the illness.) Bipolar I disorder usually first appears when a person is in his teens or 20's and endures for the remainder of the person's life, primarily as episodes of mania or depression, which may or may not be associated with psychotic processes, e.g., hallucinations, delusions, and such. Treatment can stabilize a patient's moods, and this typically diminishes the psychotic symptoms as well. When asked whether she believed Defendant may have exaggerated his symptoms, Dr. Phillips replied negatively. She explained that his statements were not only extremely consistent, but also fit the pattern of a known psychosis. Further, he was cooperative, remarkably open, and not hesitant to express his uncertainties.

When asked her opinion on whether Defendant was able to understand the wrongfulness of his actions at the time he killed his daughter, Dr. Phillips believed that Defendant recognized his actions were contrary to man's law and that he would be arrested, but God's law was higher and, therefore, his conduct was justified and ultimately not wrong.

Dr. Samuel Craddock, a clinical and forensic psychologist at MTMHI and a member of the forensic services team assigned to evaluate Defendant, testified that Defendant's initial period of assessment at MTMHI began August 25, 1999, and extended through September 17, 1999. During this time, the team conducted various tests. The results of the first test indicated that Defendant was of average or above average intelligence, with college level reading and comprehension skills. Defendant was also given three personality tests, which indicated that he was attempting to present himself as having "no difficulty." Dr. Craddock explained that "[Defendant] was forthright and consistent with the way he presented himself during clinical interviews as though everything was fine, 'I'm not mentally ill, let's just go on and proceed, I don't need to be here.'"

Based on what Defendant had described to him and reports of his earlier behavior, Dr. Craddock came to the conclusion that Defendant was "out of touch with reality at the time of his daughter's death." Defendant considered his actions "logical and justified." In Dr. Craddock's opinion, Defendant was suffering from a severe mental disease, specifically, a "psychosis," at the time of the crime, which means that he was not able to make accurate perceptions of reality. Defendant maintained "a very strong delusion that sacrificing his daughter would bring the second coming of Christ, his daughter would be resurrected, and everything would be fine" afterward. Dr. Craddock distinguished delusions from hallucinations: a "hallucination is when somebody is perceiving something that doesn't exist." Most frequently, individuals hear voices when no one is there. By contrast, "delusions are false beliefs that may or may not be a hallucination." Further, "a person can be very delusional and not have hallucinations. They can have this false belief that is irrefutable, regardless of how you try to reason with them, they are absolutely convinced that they are right. " According to Dr. Craddock, Defendant was suffering from both when he committed the crime.

When asked whether he was able to determine whether Defendant's perception of reality allowed him to understand the wrongfulness of his actions at the time he killed his daughter, Dr. Craddock replied that Defendant's act was not malicious, he had no criminal intent, and although he now describes his act as horrible and repugnant, he was convinced that killing his daughter was necessary. During cross-examination, Dr. Craddock opined that Defendant understood the "nature" of his act, but had his own personal, albeit inaccurate, belief as to what the consequences would be. Put another way, Defendant understood what he was doing but did not know that it was "wrong," in that he believed his act was "absolutely for the betterment of humanity." He also knew that what he did was illegal, in that he could be arrested, but believed that his actions were moral, rightful, and for the greater good.

At the conclusion of Defendant's initial assessment at MTMHI, the evaluation team reported that he had experienced a "brief psychotic disorder" at the time of the crime but suffered no current mental illness. Defendant was discharged and readmitted a few days later. Upon his return to MTMHI, Defendant was a "strikingly different" individual, according to Dr. Craddock, and "certainly psychotic." Defendant's condition improved after he was placed on psychotropic medications. Dr. Craddock added, however, that when the medications were reduced, the symptoms increased, as one may reasonably expect in cases of genuine mental illness.

On December 17, 1999, Defendant's diagnosis was changed to "psychotic disorder NOS." The acronym "NOS" stands for "not otherwise specified," a term used by the treating doctors when a good explanation for the psychotic condition has not yet been determined. As of the date of trial, Defendant's diagnosis was "bipolar I disorder." Dr. Craddock explained the seemingly inconsistent diagnoses as follows: A "brief psychotic disorder" is a disturbance characterized by a sudden onset of one or more cognitive psychotic symptoms, e.g., delusions, hallucinations, disorganized speech, derailment, incoherence, grossly disorganized or catatonic behavior. The episode lasts up to one month, and the individual displays a full return to premorbid functioning. "Psychotic disorder NOS" includes the same psychotic symptomology as the previous category, but the information was inadequate to make a specific diagnosis. "Bipolar I disorder" is characterized by one or more manic or depressive episodes or a combination of both. Dr. Craddock testified that all three are serious mental diseases or defects, and the longer a patient stays in treatment at MTMHI, the more information the evaluation team can gather for diagnostic purposes. Defendant's symptoms have not been inconsistent with each other, and he showed no signs of malingering during observation. Dr. Craddock opined that Defendant was initially misdiagnosed due to an extraordinary effort on his part to appear normal.

Dr. Ronnie Gene Stout, a psychologist at MTMHI's maximum security forensic treatment unit, testified that he began treating Defendant when he was admitted in September of 1999, approximately one year prior to trial, which translated to more than 120 visits. Dr. Stout and Dr. Farooque signed the report which diagnosed Defendant with psychotic disorder NOS on December 17, 1999, but since then, the diagnosis had been amended to bipolar I, also a severe mental disorder. Dr. Stout also testified that during the course of his meetings with Defendant, he had observed no signs of malingering or exaggerating of symptoms. On the contrary, his experience with Defendant

indicated that he often attempted to minimize his signs of illness, especially during the first stages of treatment.

Based on the results of two personality tests given Defendant, specifically, the Rorschach Inkblot Test and Thematic Apperception Test, Dr. Stout determined that Defendant's thinking was very disorganized. With regard to the progressive modifications in Defendant's diagnoses, Dr. Stout testified that a shift from "brief psychotic episode" to "psychotic NOS" to "bipolar I" is not remarkable in a bipolar disorder case, unless the patient had a clear prior history of the disorder, which Defendant did not. Proper diagnosis of the bipolar disorder usually requires observation for a significant length of time.

During cross-examination, Dr. Stout testified that his opinions regarding Defendant related only to his condition while at MTMHI. Dr. Craddock evaluated Defendant's mental state at the time of the crime. In other words, Dr. Stout did not perform a "state of mind examination, as to the forensic issues."

Dr. Royeka Sultana Farooque, a psychiatrist at MTMHI, testified that she initially met Defendant a year prior to the trial. At that time, she noted "some symptomology" but was unable to pinpoint what was wrong with him. She sent Defendant back to jail, but he was back at MTMHI within a week. Upon his return, the symptoms of mental illness were obvious, and she began treatment with antipsychotic medications and therapy. Although Dr. Farooque opined that Defendant was competent to stand trial, she stated that he was also mentally ill, specifically, with bipolar I disorder. She explained that at Defendant's initial assessment in August 1999, she did not have sufficient information to diagnose this illness. A long period of observation is necessary to properly diagnose bipolar I disorders. Dr. Farooque reported that Defendant had been very cooperative, and at no time had she observed any indication that he may have been "malingering" or exaggerating his symptoms.

Dr. Farooque classified bipolar I disorder as "a very serious kind of mental illness," characterized by alternate periods of manic behavior and periods of depression. When the patient is manic, he or she may be hyperactive, hyper-religious, and grandiose, with less need for sleep. The patient is often prone to talk incessantly, but makes little sense. At other times, the patient may be very depressed or "down in the dumps," with no energy, no interests, and a desire to commit suicide. Dr. Farooque testified that she tried to reduce Defendant's medication in April 2000, but he became depressed and suicidal very rapidly. She sent him back to jail "with heavy medication." At the time of trial, Defendant was taking depakote, a mood stabilizer used to treat "affective competence"; prozac, an antidepressant medication; olanzapine, which controls psychotic behavior; and vistaril, a mild tranquilizer.

Dr. Farooque further testified that, at the time of the crime, Defendant was suffering from a "brief psychotic disorder with marked stressors," a severe mental condition. In response to the question whether Defendant was able to appreciate the wrongfulness of his acts at that time, Dr. Farooque replied negatively. The delusions and hallucinations Defendant was experiencing at that

time prevented him from both appreciating the wrongfulness of his actions and maintaining his touch with reality.

During cross-examination, Dr. Farooque opined that Defendant killed his daughter intentionally because he received direction from God, but she refused to give an opinion as to whether or not Defendant knew that it was "against the law of Tennessee" to do so. Dr. Farooque explained that, based on hallucinations and delusional thinking, Defendant believed the killing was necessary for Jesus to return and, therefore, it was the right thing to do and he could not stop from doing it. According to Dr. Farooque, the facts that he was happy afterward, showed no emotion regarding his daughter's death, and did not attempt to conceal the crime constituted further proof that he did not consider what he did to be wrong.

Dr. Daniel Martell, a forensic psychologist, testified that he became involved in this case when the assistant district attorney, Mr. Hibbett, asked him to provide the State with a second opinion about Defendant's mental state at the time of the crime. In preparing his report, Dr. Martell reviewed the 911 tape; the police officers' notes regarding interviews of witnesses and Defendant; the medical record concerning Defendant's treatment and therapy at MTMHI, including the psychological evaluations, social history, and raw data from psychological tests performed; and the police reports. In addition, Dr. Martell met with Drs. Stout and Farooque and then examined Defendant on December 2, 1999, for three and one-half hours. During his meeting with Defendant, Dr. Martell gave him a test designed "for the sole purpose of catching people who are faking mental illness to get out of trouble with the law," and a test "which catches people trying to fake brain damage or some kind of mental retardation." Dr. Martell also gave Defendant various psychological tests and interviewed him.

Summarizing his findings, Dr. Martell first testified that his results were entirely consistent with the results from the tests conducted at MTMHI, which he concluded were properly administered and properly scored. Dr. Martell found no evidence of malingering or "faking" on the part of Defendant and believed that he was in remission during his initial assessment at MTMHI. Dr. Martell testified that at the point Defendant was readmitted, he was clearly psychotic and scored as a schizophrenic patient. Schizophrenia indicates a "break from reality," and patients typically hear voices, see visions, and are confused in their thinking. They may also have delusions, which can be paranoid (e.g., people are after them), grandiose (e.g., they have special powers), or religious, as in this case, during which the patient believes he has a special relationship with God. Schizophrenics usually appear normal until they reach their mid 20's, approximately Defendant's age. At this point, they begin to have strange ideas as their brain chemistry changes. Schizophrenia is a genetic disease and present in Defendant's family history.

Dr. Martell further testified that Defendant's remission shortly after the crime was consistent with his diagnosis. Typically, the symptoms of schizophrenia are not steady, but episodic. The schizophrenic patient has periods of normal functioning until the next psychotic break occurs, and this continues throughout the patient's life. In Dr. Martell's opinion, Defendant had a psychotic break in the period leading up to the crime, and then went into remission afterward. In jail he

suffered another psychotic break and was sent to MTMHI, where he was subsequently found competent to stand trial, but shortly thereafter he returned and was declared incompetent. This cyclic phenomenon is completely consistent with the nature of this disease. Dr. Martell testified that he was not surprised that the most recent diagnosis of Defendant's condition found that he was suffering from bipolar I disorder. The two diseases have significant similarities. During the depression and manic phases of bipolar I disorder, the patients often hear voices or have grandiose delusions. The primary distinction is that bipolar patients have more emotional highs and lows than schizophrenics, who tend to be "flat" by comparison and disturbed primarily by voices and delusions.

When Dr. Martell was asked whether he believed that Defendant was suffering from a serious mental disorder at the time he committed the crime, he responded affirmatively and added that the disorder will continue to plague Defendant throughout his life. Dr. Martell testified that, in his opinion, Defendant was unable to appreciate the wrongfulness of his actions at the time that he smothered his child. He based his conclusion on his belief that Defendant believed he was "truly hearing the voice of God commanding him to do this" and that the following day would be the second coming of Christ. Thus, in Defendant's mind, he needed to provide a sacrifice "to prove to God his worthiness to have an important place in Christ's government."

During cross-examination, Dr. Martell further opined that Defendant understood the nature and consequences of his criminal act and, because of this, it was an agonizing experience for him. Dr. Martell acknowledged that Defendant made statements to the police wherein he claimed to understand that killing his daughter was wrong according to man's laws, at least after the fact, but whether Defendant appreciated that it was "illegal" at the time he was committing the crime, Dr. Martell was not certain. According to Dr. Martell, Defendant believed killing his daughter was the right thing to do, considering that the instructions were coming from God. Defendant understood that his actions were contrary to the socially accepted moral standard, but they were not contrary to his subjective moral standard, which was in a state of turmoil at the time.

The State presented no rebuttal expert witness testimony regarding Defendant's insanity defense.

ANALYSIS

I. Sufficiency of the Evidence

When evidentiary sufficiency is questioned on appeal, the standard of review is whether, after considering all the evidence in the light most favorable to the State, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 318-319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999); Tenn. R. App. P. 13(e). In determining the sufficiency of the evidence, we will not reweigh the evidence or substitute our own inferences for those drawn by the trier of fact. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Instead, on appeal, the State is entitled to the strongest legitimate

view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom. Hall, 8 S.W.3d at 599. A guilty verdict by a jury, approved by the trial court, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the prosecution's theory, effectively removing the presumption of innocence and replacing it with a presumption of guilt. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions concerning the credibility of witnesses, the weight and value of evidence, and factual issues raised by the evidence are matters to be resolved by the trier of fact, not this Court. Id. The defendant bears the burden of demonstrating that the evidence is insufficient to support his or her conviction. State v. Pike, 978 S.W.2d 904, 914 (Tenn. 1998); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

Here, Defendant contends that he met his burden of proof in establishing the defense of insanity by clear and convincing evidence. Defendant argues that the successful establishment of this defense, without conflicting proof, rendered the evidence against him insufficient to support his convictions. After a thorough review of the record, we respectfully disagree with Defendant.

Effective July 1, 1995, the defense of insanity became an affirmative defense. The applicable statute provides that

> It is an affirmative defense to prosecution that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature or wrongfulness of such defendant's acts. Mental disease or defect does not otherwise constitute a defense. The defendant has the burden of proving the defense of insanity by clear and convincing evidence.

Tenn. Code Ann. § 39-11-501(a) (1997). The current statute clearly places the burden of proof upon the defendant to establish insanity by clear and convincing evidence. See id. "Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.2 (Tenn. 1992).

Under the previous statute, if the proof presented at trial raised a reasonable doubt as to the defendant's sanity, the burden shifted to the state to prove sanity beyond a reasonable doubt. State v. Jackson, 890 S.W.2d 436, 440 (Tenn. 1994). The state is no longer required to do so, regardless of whether the defendant is successful. See State v. Holder, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999). Further, the previous version allowed this defense "if, at the time of such conduct, as a result of mental disease or defect, the person lacked substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform that conduct to the requirements of law." Tenn. Code Ann. § 39-11-501 (1991). Id. The present statute raises the bar of proof by providing that insanity is an "*affirmative* defense," which applies when the defendant, "as a result of a *severe* mental disease or defect, was *unable* to appreciate the nature or wrongfulness of such defendant's acts." Tenn. Code Ann. § 39-11-501(a) (1997) (emphasis added). The 1995 amendment was a clear attempt on the part of our legislature to substantially restrict the defense of insanity in Tennessee, see Holder, 15 S.W.3d at 910-11, as is within its prerogative. In fact, the United States Supreme

Court has never held that the conviction of a person adjudged "insane" at the time he committed the criminal offense is a violation of that person's constitutional rights, even though the compelling of a mentally incompetent person to stand trial clearly violates that person's due process rights. See Medina v. California, 505 U.S. 437, 449, 112 S.Ct. 2572, 2579, 120 L.Ed.2d 353 (1992).

In determining the issue of insanity, the trier of fact may consider both lay and expert testimony and may discount expert testimony which it finds to be in conflict with the facts of the case. State v. Sparks, 891 S.W.2d 607, 616 (Tenn. 1995); State v. Jackson, 890 S.W.2d 436, 440 (Tenn. 1994). Where there is a conflict between expert testimony and other testimony as to the facts, the trier of fact is not required to accept expert testimony over the other testimony and must determine the weight and credibility of each in light of all the facts and circumstances of the case. Edwards v. State, 540 S.W.2d 641, 647 (Tenn. 1976). When evaluating the defendant's mental status at the time of the alleged crime, the trier of fact may consider the evidence of his actions before, during, and immediately after the time of the offense. Sparks, 891 S.W.2d at 616; Humphreys v. State, 531 S.W.2d 127, 132 (Tenn. Crim. App. 1975).

Defendant was convicted of two counts of first degree murder. The first requires proof that Defendant committed a premeditated and intentional killing. See Tenn. Code Ann. § 39-13-202(1) (1997). The second requires proof that Defendant committed the killing of another in the perpetration of or attempt to perpetrate a felony, in this case, aggravated child abuse. See Tenn. Code Ann. § 39-13-202(2) (1997).

First, we observe that the proof adduced at trial was clearly sufficient to prove beyond a reasonable doubt that Defendant intentionally and with premeditation killed his daughter. Defendant confessed to his wife, Officer Mike Wentzell, Detective Scott Osborn, Detective James Burton, and numerous medical personnel that he committed the crime. The proof revealed that Defendant intentionally killed his daughter to pave the way for Christ's second coming and, further, that the act was premeditated, i.e., the intent to kill her was "formed prior to the act itself." Tenn. Code Ann. § 39-13-202(d) (1997). Defendant admitted that he argued with God when he first received instructions to kill his child and that his first attempt to smother her with the teddy bear was unsuccessful. Thus, he resorted to using his hand, in the fashion of a "baptism." The proof was also sufficient for a rational jury to find that Defendant killed his daughter in the perpetration of or attempt to perpetrate aggravated child abuse. His actions clearly adversely affected the child's health and welfare, constituting abuse which resulted in serious bodily injury to the child. See Tenn. Code Ann. § 39-15-402 (1997).

In cases where an insanity defense is presented, as here, our inquiry continues. As stated above, if a defendant can prove by clear and convincing evidence that, "at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature or wrongfulness of such defendant's acts," he may be found not guilty of the crime. Tenn. Code Ann. § 39-11-501(a) (1997). The insanity defense has two prongs, both of which must be satisfied: (1) a severe mental disease or defect must exist at the

time of the crime, and (2) the disease or defect must have resulted in the defendant's inability to appreciate the nature or wrongfulness of his criminal actions.

With regard to the first prong, whether Defendant suffered from a severe mental disease or defect, the proof overwhelmingly supports Defendant's position. Of the four medical experts who testified concerning Defendant's mental health at the time he killed his daughter, all four concurred that he suffered from a severe mental disease during his commission of the crime. The State presented no rebuttal expert testimony and, in fact, the expert witness initially recruited by the State to support its case ultimately rendered an opinion in favor of the Defendant.

The second prong is another matter. After viewing the evidence in the light most favorable to the State, we conclude that a rational trier of fact could have found that Defendant failed to show that his mental disease or defect resulted in his inability to appreciate the nature or wrongfulness of his criminal actions by clear and convincing evidence.

First, the record contains numerous statements by Defendant which clearly attest that he believed what he did was "wrong." According to Officer Mike Wentzell, Defendant said he knew what he did was "wrong" as they drove to the jail in the police car. A few hours later, near the conclusion of his second interview, Detective Scott Osborn asked Defendant whether, "based on the laws and rules that people have here on earth that we go by, [did he] feel like what [he] did was wrong?" Defendant told the detective that he knew what he did was "wrong" and that "he could be punished for it." At the conclusion of the same interview, Detective James Burton also asked Defendant whether, "according to the laws of this country and . . . land, [did] he think that what he did was wrong," and Defendant replied: "Oh, yes, sir. What I did according to the laws of this country, yes, sir, it was wrong. But I don't go by the laws of this land, I go by the laws of God."

The experts' testimony, while unequivocal on the issue of Defendant's mental disease or defect, was notably less decisive on the matter of whether Defendant appreciated the nature or wrongfulness of his actions. Dr. Sandy Phillips believed that Defendant recognized his actions were contrary to man's law and that he would be arrested. However, because God's law superseded man's law, his conduct was justified and, ultimately, not "wrong."

Dr. Samuel Craddock testified that Defendant's action was without malice or criminal intent and, although Defendant later described his action as horrible and repugnant, he was convinced that killing his daughter was necessary. Dr. Craddock believed that Defendant understood the "nature" of his actions, but because they were intended to benefit humanity, he did not believe them to be "wrong." However, Dr. Craddock also opined that Defendant knew his conduct was illegal and that he could be arrested.

Dr. Martell believed that Defendant was unable to appreciate the wrongfulness of his actions because he believed he was acting under the command of God. However, Dr. Martell also opined that Defendant understood the nature and consequences of his act and, because of this, it was an agonizing experience for him. Dr. Martell refused to state an opinion as to whether Defendant

appreciated that his actions were "illegal," but he did believe that Defendant understood his actions were contrary to the "socially accepted moral standard," even though they were probably not contrary to his subjective moral standard, which was arguably in a state of turmoil at the time of the crime.

In addition to the testimony from lay witnesses and medical experts, the jury may look to the evidence of a defendant's actions and words before, at, and immediately after the commission of the offense in determining his mental status. State v. Holder, 15 S.W.3d 905, 912 (Tenn. Crim. App. 1999). Thus, the following circumstances may be considered relevant to the issue whether Defendant appreciated the wrongfulness of his actions: Defendant described the killing to Detective Osborn as "horrible" and said that the time it took to kill his daughter "seemed like an eternity." When talking with Detective Burton, Defendant confessed that he had hoped his wife would not enter the room during the sacrifice because it would be "hard on her." Finally, Defendant took the telephone from his wife and hung up on the 911 dispatcher when his wife attempted to report the killing.

As previously noted, under State v. Holder, the jury may consider both lay and expert testimony and it may discount expert testimony which it finds to be in conflict with the facts presented when determining the issue of insanity. Id. Further, where there is a conflict between expert and other testimony, the jury is not required to accept expert testimony over the other testimony; instead, it must determine the weight and credibility of each in light of all the facts and circumstances of the case. Id. Defendant has the burden to establish insanity by clear and convincing evidence, which means "evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." Hodges, 833 S.W.2d at 901.

From the above proof, a rational jury could conclude that Defendant appreciated the nature or wrongfulness of his criminal act. Defendant's statements clearly indicated that he considered killing his daughter "wrong," in some form or another. At the very least, he found it extremely unpleasant. In addition, he knew his wife would be terribly upset and that he would probably be arrested afterward. The jury may discount the proof introduced through expert testimony which it finds to be in conflict with the facts presented when determining the issue of insanity and, where there is a conflict between expert and other testimony, the jury is not required to accept the expert testimony over the other. Holder, 15 S.W.3d at 912. Questions concerning the credibility of witnesses, the weight and value of evidence, and factual issues raised by the evidence are matters to be resolved by the trier of fact, not this Court. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). By its verdict, the jury found in effect that Defendant failed to establish insanity by clear and convincing evidence. Viewing the evidence in a light most favorable to the state, we conclude that a rational trier of fact could have made such a finding.

Defendant argues that the facts in his case are analogous to those presented in State v. Christopher M. Flake, No. W2000-01131-CCA-MR3-CD, 2001 WL 792621, Shelby County (Tenn. Crim. App., Jackson, July 13, 2001) perm. to app. granted (Tenn. 2001) (Flake's appeal is currently pending before the Tennessee Supreme Court). As a preliminary matter, we note that Flake, as an

unpublished opinion, shall be considered persuasive authority only. See Tenn. R. S. Ct. 4(H)(1). In Flake, the defendant was convicted by a jury of voluntary manslaughter, as a lesser-included offense of attempted first degree murder. On appeal, the defendant argued, inter alia, that his insanity defense was established by clear and convincing evidence. A panel of this Court agreed and reversed the judgment of conviction, modifying it to "Not Guilty by Reason of Insanity." Defendant contends that the facts in his case are sufficiently analogous to those in Flake so as to require that this Court do likewise. We do not agree.

After a thorough review of the evidence, the Court in Flake came to the following "inescapable conclusion": "a rational trier of fact could only find that there is no serious or substantial doubt that the defendant, at the time of the shooting, was unable to appreciate the wrongfulness of his act as a result of a severe mental disease. Thus, the defense of insanity was established by clear and convincing evidence." Id. at *5. In Flake, this Court distinguished State v. Holder, a case in which the defendant challenged his conviction of first degree premeditated murder following a bench trial. The trial court had rejected Holder's insanity defense. On appeal, this Court affirmed the conviction, pointing out that the trial judge in Holder "specifically recited numerous instances of the defendant's conduct at or near the time of commission of the offense, including the defendant's admission that he knew the killing was 'wrong.'" Id. at *6 (citing Holder, 15 S.W.3d at 909-910). In short, this Court's review of the record in Flake "d[id] not reveal sufficient lay testimony, nor expert testimony, concerning the defendant's mental state at or near the time of the shooting that would justify rejection of the insanity defense." Flake, 2001 WL 792621 at *6.

Similarly to the situation in Holder, the record here reveals a sufficiency of facts concerning Defendant's conduct at or near the time of the commission of the offense, including admissions that he knew the killing was "wrong." Consequently, the facts presented here do not call for the same "inescapable conclusion" accorded the facts in Flake. If we were deciding Defendant's case under the law as it existed prior to the 1995 amendment, our disposition of this case could well be different. However, we are bound to follow the mandates of the General Assembly, when its Acts are constitutional, and the current insanity defense statute has been deemed to be so. See Holder, 15 S.W.3d at 913. Defendant is not entitled to relief on this issue.

II. Jury Instruction Error

Defendant contends that the trial court committed reversible error by failing to instruct the jury concerning how to properly define "wrongfulness" in considering the defense of insanity. We disagree.

According to the record, the issue whether to give the jury a specific definition of "wrongfulness" was raised prior to the conclusion of trial. After discussing the matter with counsel for both the Defendant and the State, the trial court stated that it considered the term "self explanatory." Defendant's counsel appeared to concur with the trial court by responding, "Your Honor, I think that is a word that is so common, that people know what wrong is." At this time, the

State also announced its intention to argue its own definition of wrongfulness to the jury during closing argument. Defendant did not object to the trial court's decision to forgo a definition of "wrongfulness" or the State's intention to argue its own definition to the jury.

The record further indicates that prior to charging the jury, the trial court supplied both attorneys with copies of its proposed instructions and gave them an opportunity to object to the prepared charge. The State did not object. Defendant's counsel did not request a special instruction on the definition of "wrong" or "wrongfulness," but clearly stated that he found the charge "acceptable." Consequently, the trial court gave the jury the following charge:

> The defendant has raised the defense that he was insane at the time of the commission of the offense. A person is not responsible for criminal conduct if at the time of the commission of the acts constituting the offense, the person as a result of a severe mental disease or defect was unable to appreciate the wrongfulness of such person's acts. A mental disease or defect by itself is not a defense. . . . For you to return a verdict of not guilty by reason of insanity the defendant must prove both of the following things by clear and convincing evidence: Number one, that he had a severe mental disease or defect at the time that the acts constituting the crime were committed. Number two, that as a result of the severe mental disease or defect he was not able to understand what he was doing or to understand what he was doing was wrong.

A defendant has a constitutional right to a complete and correct charge of the law. State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990). In determining whether jury instructions are erroneous, this Court must read the entire charge but only invalidate it if, when read as a whole, it fails to fairly submit the legal issues or misleads the jury as to the applicable law. See State v. Vann, 976 S.W.2d 93, 101 (Tenn. 1998). It is not error to refuse to give a special instruction requested by a party, if the instructions given by the trial judge correctly, fully, and fairly set forth the applicable law. State v. Bohanan, 745 S.W.2d 892, 897 (Tenn. Crim. App. 1987). Since our review reflects that the instructions given by the trial court were a complete and correct charge of the current law concerning an insanity defense, Defendant is not entitled to relief on this issue.

III. Voluntary Manslaughter

Defendant was charged with premeditated and intentional first degree murder and murder committed in the perpetration of or attempt to perpetrate aggravated child abuse. The trial court instructed the jury on first degree murder, second degree murder, and reckless homicide as lesser-included offenses of both crimes. See State v. Ely, 48 S.W.3d 710, 721-22 (Tenn. 2001) ("the offenses of second degree murder, reckless homicide, and criminally negligent homicide are lesser-included offenses of felony murder under part (b) of the Burns test"). The jury returned a verdict of guilty for the greater offenses charged in the indictment. Defendant contends that the trial court committed reversible error by failing to charge the jury on the lesser-included offense of voluntary manslaughter. We disagree.

Voluntary manslaughter is a lesser-included offense of first and second degree murder. State v. Dominy, 6 S.W.3d 472, 477 n.9 (Tenn. 1999) (the "passion" language in the definition of voluntary manslaughter simply reflects a less culpable mental state than required for first or second degree murder). Under State v. Burns, 6 S.W.3d 453 (Tenn. 1999), a jury should be instructed on a lesser-included offense if, when viewed in the light most favorable to the existence of the offense, evidence exists that reasonable minds could accept as to the lesser-included offense and would also be legally sufficient to support a conviction. Id. at 469. In this case, however, the trial court's failure to instruct on voluntary manslaughter, even if error, would be harmless beyond a reasonable doubt. State v. Williams, 977 S.W.2d 101 (Tenn. 1998).

In Williams, the defendant was on trial for first degree murder. The trial judge instructed the jury on the elements necessary to prove first degree premeditated murder, and the lesser-included offenses of second degree murder and reckless homicide. The jury ultimately convicted the defendant of first degree murder. The defendant argued that because the proof introduced at trial was legally sufficient to warrant an instruction upon voluntary manslaughter, the trial court erred in refusing to charge that offense to the jury. The supreme court agreed that the jury should have been instructed on voluntary manslaughter, but further concluded that the trial court's failure to instruct was harmless error. See id. at 106. Specifically, the court in Williams determined that

> [B]y finding the defendant guilty of the highest offense to the exclusion of the immediately lesser offense . . . the jury necessarily rejected all other lesser offenses . . . . Accordingly, the trial court's erroneous failure to charge voluntary manslaughter is harmless beyond a reasonable doubt because the jury's verdict of guilt on the greater offense of first degree murder and its disinclination to consider the lesser included offense of second degree murder clearly demonstrates that it certainly would not have returned a verdict on voluntary manslaughter.

Id. at 107 (citations omitted).

Applying the above principle to this case, we may conclude that by finding Defendant guilty of both first-degree murder offenses, the jury necessarily rejected any other lesser offenses charged. More specifically, the jury's disinclination to consider the lesser-included offense of second degree murder clearly demonstrates that it certainly would not have returned a verdict of guilty for voluntary manslaughter on either of the murder counts. Defendant is not entitled to relief on this issue.

If we affirm Defendant's convictions, which we have, he requested that this Court then consider reducing the grade of his conviction from first degree murder to voluntary manslaughter. Defendant contends that the proof adduced at trial supports, at most, a conviction for voluntary manslaughter. He relies on State v. Thornton, 730 S.W.2d 309 (Tenn. 1987), and Davis v. State, 28 S.W.2d 993 (Tenn. 1930) to support this argument.

Defendant's reliance on these cases is clearly misplaced. In both cases, the defendant killed a person he believed to be his wife's lover. In Davis, the defendant was mistaken. He had developed

an insane delusion, wholly false, that there had been improper relations between his wife and the victim before he shot him. After some deliberation the jury found that Davis was insane on the subject of the relations between his wife and the victim, but that he knew the difference between right and wrong, and ultimately found Davis guilty of second degree murder. Id. at 995. On appeal, the supreme court set aside the murder conviction and reduced the charges to voluntary manslaughter, finding that in cases where "the excitement and passion adequately aroused obscures the reason of the defendant, the killing will be reduced to manslaughter." Id. The court concluded that "a defendant acting under such temporary mental stress is presumed to be incapable of malice, an essential ingredient of murder." Id.

In Thornton, the defendant "actually discovered his wife in flagrante delicto with a man who was a total stranger to him, and at a time when [defendant] was trying to save his marriage . . . ." Thornton, 730 S.W.2d at 315. In the opinion of our supreme court, "the passions of any reasonable person would have been inflamed and intensely aroused by this sort of discovery." Id. The court thus reduced his conviction to voluntary manslaughter based on its finding of legally sufficient provocation.

The facts in these two cases are clearly distinguishable from the circumstances presented here. The record before us reveals no proof that Defendant's criminal act occurred during a state of passion produced by provocation, adequate or otherwise. Consequently, voluntary manslaughter is not an appropriate charge. See Tenn. Code Ann. § 39-13-211 (1997). Defendant is not entitled to relief on this issue.

IV. Limiting Instruction

Defendant contends that the trial court erred when it improperly limited the testimony of Defendant's expert witnesses and, again, when it gave erroneous instructions to the jury regarding such limitation. We disagree.

The testimony and instruction in issue occurred during Defendant's redirect examination of the expert witness, Dr. Farooque. In relevant part, the colloquy transpired as follows:

DEFENDANT:	At the time that [Defendant] took Erin's life, did he know it was wrong to take her life, under the delusion that he was acting out?
DR. FAROOQUE:	No.
DEFENDANT:	Did he appreciate the wrongfulness of what he did, under the delusion that he was acting out?
STATE:	Objection.

At this point, the jury exited the courtroom and a discussion was had between the attorneys and the trial judge. The trial judge informed Defendant's counsel that the issue whether a severe mental disease or defect actually operated to prevent a defendant from appreciating the wrongfulness of his act is a matter solely for the jury to determine. When the jury returned, the trial court gave the following instruction:

> COURT: All right, ladies and gentlemen of the jury, I'm going to tell you, it may be in another way but I'm going to tell you again. First of all, an expert may testify that the defendant, as is the case here, suffers from a severe mental disease or defect. A expert may also testify that a defendant could not have appreciated the nature of the wrongfulness of his conduct at the time of the offense; however, it is your job, only your job, to connect the two. That meaning, basically, that you all decide whether or not that severe mental disease or defect operated to prevent the defendant from appreciating the nature of the wrongfulness of his conduct. You all make that decision. This expert or any other expert, cannot join those two clauses. That is your ultimate job, all right.

Defendant argues that both the limitation placed on Dr. Farooque's testimony by the trial judge, and the instruction to the jury which followed, were contrary to Tennessee Code Annotated subsection 39-11-501(c) and, therefore, error. Defendant contends that this error effectively "shackled" the defense experts and "unduly muzzled" the defense team by precluding Defendant from proving an important component of his insanity defense, which resulted in a violation of his constitutional right to a trial by jury.

Tennessee Code Annotated section 39-11-501 provides as follows:

> (a) It is an affirmative defense to prosecution that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature or wrongfulness of such defendant's acts. Mental disease or defect does not otherwise constitute a defense. The defendant has the burden of proving the defense of insanity by clear and convincing evidence.
>
> (b) As used in this section, "mental disease or defect" does not include any abnormality manifested only by repeated criminal or otherwise antisocial conduct.
>
> (c) *No expert witness may testify as to whether the defendant was or was not insane as set forth in subsection (a). Such ultimate issue is a matter for the trier of fact alone.*

(Emphasis added.)

In his brief, Defendant concedes that a panel of this Court addressed a similar issue in State v. Perry, 13 S.W.3d 724 (Tenn. Crim. App. 1999), and that the holding in Perry does not support his argument. Specifically, the issue in Perry was whether subsection 39-11-501(c) unconstitutionally restricted the defendant from presenting evidence that he was insane at the time of the crime, thereby preventing him from disproving the mental element of the offense charged. After a review of the record and applicable law, this Court held that

> Although subpart (c) precludes an expert from testifying that the defendant was, in fact, legally "insane" at the time of the commission of the offense, the expert may testify that the defendant suffered from a severe mental disease or defect. The expert may also state whether the defendant could have appreciated the nature or wrongfulness of his conduct at the time of the offense. *Subpart (c), however, does prevent the expert from stating that the severe mental disease or defect operated to prevent the defendant from appreciating the nature or wrongfulness of his conduct.* In that regard, the jury must render the ultimate determination as to the effect of mental disease on the defendant's understanding of his conduct at the time of the offense.

Id. at 742 (emphasis added).

In summation, we find that subsection 39-11-501(c) is fatal to Defendant's argument. Clearly, "[n]o expert witness may testify as to whether the defendant was or was not insane as set forth in subsection (a)," which expressly means that no expert witness may testify as to whether "at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature or wrongfulness of such defendant's acts." Further, we are unpersuaded that our holding in Perry should be reversed or that allowing the jury to determine this matter deprived Defendant of his right to a jury trial. Defendant is not entitled to relief on this issue.

CONCLUSION

For the forgoing reasons, we AFFIRM the judgment of the trial court.

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THOMAS T. WOODALL, JUDGE